

**MINUTES OF
AD HOC COMMITTEE ON RULES OF EVIDENCE**

Friday, August 20, 2010

Arizona Courts Building

1501 W. Washington, Conference Room 109

Web Site: <http://www.azcourts.gov/rules/AdHocCommitteeonRulesofEvidence.aspx>

Members Present:

The Honorable Andrew Hurwitz, Chair
The Honorable Michael Miller
The Honorable Samuel Thumma
Mr. Paul Ahler
Prof. Dave Cole
Mr. Timothy Eckstein
Mr. Milton Hathaway
Mr. Carl Piccarreta
Ms. Patricia Refo

Members Not Present:

Staff Present:

Mark Armstrong

Quorum:

Yes

1. Call to Order—Justice Hurwitz

Justice Hurwitz called the meeting to order at 9:05 a.m.

2. Approval of Minutes from 6/18/2010 Meeting—Justice Hurwitz

The committee voted unanimously to approve the draft minutes.

3. Rules 410 Subcommittee Supplemental Report—Judge Miller

At the June 2010 meeting, Justice Hurwitz asked the subcommittee to attempt to determine the meaning of “on the record” in subdivision (ii) of FRE 410 as interpreted in federal case law. Judge Miller reported orally that the subcommittee could find no definition of “on the record” in either case law or statute. The committee reaffirmed its consensus to recommend amending ARE 410 and Ariz. R. Crim. P. 17.4(f) as previously recommended at pages 3 and 5 of the undated Rule 410 Subgroup Report.

4. Rule 609 Subcommittee Supplemental Report—Prof. Cole

At the June 2010 meeting, Justice Hurwitz asked the subcommittee to ascertain whether Arizona case law makes any distinction between “credibility” and “character for truthfulness.” Justice Hurwitz stated he would attempt to determine why the federal rules distinguish between the two terms. Justice Hurwitz and Judge Armstrong stated they would look at the history of the two versions of the rule. These issues were discussed by e-mail that was subsequently distributed to all committee members. The most recent e-mail in this chain is dated Friday, July 23, 2010 1:45 PM.

Prof. Cole reported in accordance with the subcommittee’s one-page Rule 609 Subcommittee Recommendation that the subcommittee recommends conforming ARE 609(a) to FRE 609(a). The Subcommittee on Undesignated Rules in Articles VIII – XI; Follow-up on Rules 609 and 611, made the same recommendation in its report, dated August 2, 2010. The committee reached consensus to change “credibility” to “character for truthfulness” in ARE 609(a) consistent with the federal rule.

[NOTE: The committee failed to address the remaining issue of whether to adopt the federal version of Rule 609(a)(2). This item therefore has been placed on the agenda for the September 2010 meeting.]

5. Rule 611 Subcommittee Supplemental Report—Judge Armstrong

At the June committee meeting, Justice Hurwitz asked Judge Armstrong to attempt to determine how the 1995 Arizona comment came about. Judge Armstrong reported the history of the comment in the Report of the Subcommittee on Undesignated Rules in Articles VIII – XI; Follow-up on Rules 609 and 611, dated August 2, 2010.

The committee reaffirmed its consensus to adopt FRE 611(a) and (c) with a comment as recommended in the subcommittee report, dated June 3, 2010; as well as its consensus not to change subsection (b). The committee also reached consensus to amend the undated comment to read: “Comment to Original 1977 Rule,” and to date all other undated comments in the Rules of Evidence.

The committee at this time also approved the following recommendations for comments set forth at page 8 of the Report of the Subcommittee on Undesignated Rules in Articles VIII – XI; Follow-up on Rules 609 and 611, dated August 2, 2010:

To make clear that these changes are stylistic only, restyled [FRE 803](#) will include the following Committee Note:

The language of [Rule 803](#) has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The subcommittee recommends that a similar comment be added to [] any [] rules that are restyled. The subcommittee also recommends that separate comments be added to any rules that are otherwise amended to be consistent with their federal counterparts, including the nature of the changes.

6. Report of Subcommittee on Article VIII Residual Exceptions and Last ¶ of FRE 801—Milt Hathaway

Milt Hathaway reported that the subcommittee was asked to look at why Arizona has two exceptions; whether we should adopt FRE 807 as an alternative; and whether we need the last ¶ of FRE 801. After entertaining the report, the committee reached consensus to approve the recommendations set forth in the report of the Subcommittee on Article VIII residual exceptions and last paragraph of FRE 801, dated August 13, 2010.

7. Report of Former Testimony Subcommittee—Prof. Cole

Prof. Cole reported that the subcommittee had been asked to look at ARE 803(25), 804(b)(1), 801(d)(1), and Ariz. R. Crim. P. 19.3. Prof. Cole further reported in accordance with the undated Former Testimony Subcommittee Recommendations, in which the subcommittee recommended that ARE 801(d)(1)(A) be amended to conform to its federal counterpart but made no recommendations with respect to the other rules assigned. After substantial discussion, the committee voted 8-1, with Paul Ahler tentatively dissenting, to so amend Rule 801(d)(1)(A) in accordance with the subcommittee’s recommendation and the recommendation of the Subcommittee on Undesignated Rules in Articles VIII – XI, as reflected in that subcommittee’s report, dated August 2, 2010, at pages 4-5. The proposed amendment would require that a prior inconsistent statement be made under penalty of perjury in order to be considered non-hearsay under the rule. The committee also voted, by the same margin, to delete ARE 803(25), which has no federal counterpart, as unnecessary in light of the proposed change to ARE 801(d)(1)(A). Although it appeared the committee supported amending Rule 804(b)(1) to conform to its

federal counterpart, no vote was ever taken. [This item will be placed on the agenda to be revisited at the committee's September meeting.]

8. Report Regarding Proposed Changes to FRE 804(b)(3) (expected to take effect December 1, 2010)—Justice Hurwitz

Justice Hurwitz reported on the proposed amendment of FRE 804(b)(3), governing statements against interest, which is set to take effect December 1, 2010. The committee reached consensus to adopt the revised federal version.

9. Report of Subcommittee on Undesignated Rules in Articles VIII – XI; Follow-up on Rules 609 and 611—Judge Armstrong

Judge Armstrong reported that the only unassigned rules in Articles VIII - XI in which there are significant differences between the state and federal versions are Rules 803(6) and (8), 1101 and 1102. The committee reached consensus to amend these rules in accordance with the Report of the Subcommittee on Undesignated Rules in Articles VIII – XI; Follow-up on Rules 609 and 611, dated August 2, 2010. The committee agreed that a comment should be added regarding the change to Rule 803(6) stating that the change is not intended to change the requirement that someone in the chain had personal or first hand knowledge of the contents of the record.

10. Committee Future and Future Subcommittee Assignments—Justice Hurwitz

Justice Hurwitz led a discussion of what the committee should do next. Justice Hurwitz agreed to invite Judge Susan Bolton and perhaps Judge Ron Reinstein to speak at our September meeting on their experience with *Frye* and/or *Daubert*. Judge Miller agreed to contact Judge Nanette Warner with a similar invitation. Judge Armstrong mentioned that he had conducted a lengthy *Frye* hearing at the juvenile transfer hearing in *State v. Kenneth Laird*, a capital case, and suggested that committee members reread *Frye*, *Daubert*, *Kumho Tire* and *Logerquist* in preparation for the September meeting.

The September and October meetings will be devoted exclusively to discussion of Article VII, with emphasis on Rule 702. The October meeting, at which Prof. Mauet will speak, will be held in Tucson [Subsequently, Justice Hurwitz arranged for the October meeting to be held at the University of Arizona College of Law from 10:00 – 2:00]. Interested parties may speak at either the September or October meeting. A suggestion was made to limit public comments to 15 minutes per speaker.

The committee reached consensus to get notice out broadly that Rule 702 will be discussed at the September and October meetings, including notice to APAAC, AACJ, Arizona Chamber of Commerce, ACC, AADC, AJA, AAJ aka ATLA, and the State Bar. Justice Hurwitz suggested that the State Bar List Serve may be the best way to provide notice to lawyers broadly. The committee delegated the subject of notice to the Subcommittee on Interest Groups, described below. The same subcommittee will meet next week to prepare a notice to the following effect:

The Supreme Court's Ad Hoc Committee on the Rules of Evidence will be discussing Article VII, including Rule 702, at its September and October meetings. The committee may recommend to the Court whether or not to amend Arizona Rule of Evidence 702 to conform to its federal counterpart. The committee will not be

discussing SB 1189, which was enacted after the committee was created, because such a discussion would be beyond the scope of the committee's purpose, which is to "compare the *Arizona Rules of Evidence* to the proposed restyled *Federal Rules of Evidence*, identify differences, and provide input to the Supreme Court regarding conforming changes." Supreme Court Administrative Order No. 2010-42, dated March 24, 2010.

The September meeting will be held on September 17, 2010, from 9:00 a.m. to 2:00 p.m., at the Arizona Courts Building, CLD Boardroom 109, 1501 W. Washington Street, Phoenix, Arizona 85007.

The October meeting will be held on October 15, 2010, from 10:00 a.m. to 2:00 p.m., at the University of Arizona, James E. Rogers College of Law, Tucson, Arizona 85721.

All interested parties are welcome to attend these meetings and comment on the issue of whether or not Arizona Rule of Evidence 702 should be amended to conform to Federal Rule of Evidence 702. The committee's September agenda may be viewed at the committee's website:

<http://www.azcourts.gov/rules/AdHocCommitteeonRulesofEvidence.aspx>

[NOTE: Subsequently, Justice Hurwitz requested that Carl contact AAJ or ATLA, Milt contact AADC, Tim contact AACJ, and Paul contact APAAC, to alert them to the September and October meetings and see if a representative would like to make a presentation to the committee.]

Trish Refo suggested that the September and October meetings be recorded. Paul Julien agreed to arrange for the meetings to be recorded.

The committee reached consensus to recommend to the Court that all comments be titled in a uniform manner. In the Evidence Rules, some comments are titled "Comments" while others are called "Court Comments." In other sets of rules, some comments are titled "State Bar Committee Notes."

Justice Hurwitz reminded the committee that this committee may evolve into a standing committee on the rules of evidence.

Justice Hurwitz created the following subcommittees:

Subcommittee on Undesignated Rules in Article VII (only Rule 702 is designated) consisting of Justice Hurwitz and Judge Armstrong. This subcommittee will also prepare a restyled version of the rules, including comments, for the November meeting.

Subcommittee on Providing Notice of September-October Meetings to Interested Groups, consisting of Justice Hurwitz, Judge Armstrong, Trish Refo and Paul Julien.

[Reminder: The committee previously agreed that subcommittee reports would be distributed to all committee members by Friday of the week prior to the week of the meeting at which the report is to be discussed.]

11. Call to the Public—Justice Hurwitz

Paul Julien commended the committee and observed that substantial education and training will be required regarding any proposed rule changes.

12. Next Meeting—Judge Armstrong

The next committee meeting will be held on September 17, 2010, from 9:00 a.m. – 2:00 p.m., at the Arizona Courts Building, Room 109, 1501 W. Washington, Phoenix, Arizona. The conference call number will be listed on the agenda.

The committee reaffirmed that it will begin consideration of Article VII at its September meeting.

13. Adjournment—Justice Hurwitz

Justice Hurwitz thanked the committee and adjourned the meeting at 1:45 pm.